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IN THE

Supreme Court of the United States

STOLT-NIELSEN S.A.,
STOLT-NIELSEN TRANSPORTATION GROUP LTD.,
AND RICHARD B. WINGFIELD,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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~~MOTION FOR LEAVE TO FILE AND~~ BRIEF OF THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* [1]

For reasons stated in the accompanying Brief of *Amicus Curiae* International Association of Independent Tanker Owners in Support of Petitioners ("INTERTANKO"), INTERTANKO respectfully requests that the Court grant leave to file the attached *amicus* brief in support of petitioners' request that a writ of certiorari issue to the United States Court of Appeals for the Third Circuit.

[1] Pursuant to Sup. Ct. R. 37.6, no counsel for a party in this case authored this brief in whole or in part, and no monetary contribution to the preparation or submission of the brief was made by any person other than the *amicus curiae*.

The Third Circuit's decision for which issuance of a writ is sought reflects conflict among the Circuits and confusion as to a private party's right to seek pre-indictment enforcement of a non-prosecution agreement with the U.S. government. Resolution of this conflict will provide INTERTANKO members, as well as other private parties, clarity and repose in decisions to assist cartel enforcement endeavors through the U.S. leniency program.

Pursuant to Rule 37.2 of the Rules of this Court, INTERTANKO has sought and received written consent for the filing of the attached *Amicus Curiae* Brief from counsel for the Petitioner and Respondent. On September 14, 2006, counsel for petitioners consented in writing to the filing of this brief. On September 15, 2006, INTERTANKO requested consent from counsel for respondents. On the same day, INTERTANKO received written consent from counsel for respondents.[2] Accordingly, counsel for INTERTANKO moves for leave to file the accompanying brief as *amicus curiae* in support of the petition for a writ of certiorari.

Respectfully submitted,

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[2] Letters from Petitioner and Respondent indicating consent to file are being filed with the clerk of the Court.

QUESTION PRESENTED

Whether the federal courts have authority to enjoin federal prosecutors of the executive branch of government from the filing of indictments against parties who have disclosed violations of federal law pursuant to Amnesty Agreements that commit the United States not to bring criminal prosecution against those parties.

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BRIEF OF *AMICUS CURIAE* INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS

INTEREST OF *AMICUS CURIAE*

INTERTANKO is an unincorporated, not-for-profit association of independent tanker owners and operators of oil and chemical tankers, with registered offices in London, Oslo, Singapore and Arlington, Virginia. INTERTANKO's principal offices are in London and Oslo. Membership in INTERTANKO is open to independent tanker owners and operators of oil and chemical tankers. As of August 2006, the organization's membership represents approximately three-quarters of the world's independent tanker fleet. As a global

association, INTERTANKO is familiar with and supports the free competition goals of the many national jurisdictions in which INTERTANKO members operate. Because the shipping industry operates in multiple jurisdictions, INTERTANKO is uniquely situated to apprise this Court of the importance of issues faced by entities working to comply with a wide range of competition regimes. INTERTANKO's goals as an association include free competition among its members. Legal regimes that promote market competition in maritime trading advance the interests of INTERTANKO members. Similarly, policies and procedures that promote compliance and disclosure by parties that find themselves in violation of competition laws also benefit shipowners who operate in one of the world's most competitive industries.

The Third Circuit's decision, however, creates conflict between Circuit Courts of the United States and thus confusion for INTERTANKO members as to a private party's right to seek pre-indictment equitable enforcement of a non-prosecution agreement with the U.S. government. Resolution of this conflict will provide INTERTANKO members and other international businesses with certainty concerning U.S. prosecutorial obligations and with regard to decisions to assist cartel enforcement endeavors through the U.S. leniency program.

INTERTANKO submits that the issue of whether federal courts may review rescission of immunity agreements prior to indictment is an issue that merits review by this Court and requests that a writ issue to the Third Circuit. Because of the important domestic and international impact of this case, to allow the Third Circuit's decision to stand would disrupt judicial harmony and create a disincentive to voluntary disclosure arrangements. Because other nations and regional competition bodies have modeled their compliance programs on those of the United States, INTERTANKO is concerned with negative international implications of the Third Circuit's

position should it remain controlling law in any region of the United States.

STATEMENT OF THE CASE

INTERTANKO adopts the Statement of the Case contained in the Petition.

SUMMARY OF ARGUMENT

This case arises from a direct conflict between Circuit courts regarding the authority of federal courts to enjoin prosecutors from abrogating non-prosecution agreements. In the instant matter, the United States Court of Appeals for the Third Circuit held that a federal district court may not enjoin the U.S. government from revoking an amnesty agreement with a private party. *Stolt-Nielsen, S.A. v. United States*, 442 F.3d 177 (3d Cir. 2006). By reversing the district court's decision to enjoin the indictment of the amnesty applicant, the Third Circuit creates a direct conflict with jurisprudence from the Seventh Circuit, which holds that the government may not set aside a non-prosecution agreement without first seeking judicial determination that the defendant had breached the agreement. *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998).

The Third Circuit's interpretation of limits on federal courts' supervisory authority threatens INTERTANKO's members with uncertainty and risk in a company's decision to enter into discussions with a competition authority, particularly in the United States. The overwhelming influence and success of the U.S. amnesty program has dominated successor programs in almost every country with an antitrust regime. Thus, while other governments have developed their own mechanisms for negotiating amnesty or leniency programs, the United States' rescission of its amnesty agreement with Stolt-Nielsen sets disturbing precedent for amnesty seekers in countries that align themselves with the U.S. model. The current climate of cooperation between the

United States and other national and regional competition regimes amplifies the issue. Even if another jurisdiction rejected the approach taken by the U.S. government in this case, potential applicants could not be assured that they could avoid subsequently defending against prosecution in the United States.

ARGUMENT

I. CONFLICT BETWEEN CIRCUITS CREATES UNCERTAINTY FOR AMNESTY APPLICANTS, JUDICIAL REVIEW WILL PROVIDE STANDARDS BY WHICH AMNESTY SEEKERS CAN GAUGE THEIR CONDUCT.

Several Circuit Courts of Appeal have decided that due process requires the government to seek a court determination of breach of a non-prosecution agreement before being released of its obligations to that defendant. The Third Circuit, on a separation of powers rationale, has held that federal courts may not enjoin U.S. Department of Justice determinations to rescind or depart from the undertakings of an amnesty agreement. The opinion below thus permits unilateral abrogation of the precise bargain sought by applicants under the DOJ's Leniency Policy—the promise to not prosecute. As such, the Third Circuit's decision has created a direct conflict with sister circuits, which is the benchmark of a genuine issue to be resolved by this Court. 28 U.S.C. § 1245.

This Court has recognized that a prosecutor must honor its agreements. In *Santobello v. New York*, this Court stated that when a defendant's agreement to implicate himself rests "to any significant degree on a promise or agreement of a prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled." *Santobello*, 404 U.S. 257, 262 (1971). The concept of prosecutorial accountability has been echoed in the Courts of Appeal. *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986);

United States v. Meyer, 157 F.3d 1067 (7th Cir. 1998); *United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981); *United States v. Brown*, 801 F.2d 352, 355 (8th Cir. 1986); *United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106, 1111 (8th Cir. 1977); *United States v. Castaneda*, 162 F.3d 832 (5th Cir. 1998); *United States v. Watson*, 988 F.2d 544, 552 (5th Cir. 1993).

In particular, the opinion below conflicts with the Seventh Circuit's position that judicial determination is required *before* the government may rescind a cooperation agreement. *United States v. Verrusio*, 803 F.2d 885 (7th Cir. 1986); *United States v. Meyer*, 157 F.3d 1067 (7th Cir. 1998). In *Verrusio*, the Seventh Circuit reversed and remanded a denial of the defendant's motion to dismiss portions of an indictment. The court held that the government improperly began trial proceedings without first obtaining a judicial determination that the defendant had breached the plea agreement.

Similarly, in *United States v. Meyer*, the Seventh Circuit held that prosecutors must obtain judicial determination of a breach, before taking the very action it bargained away in the agreement. In so holding, that Court of Appeals reasoned that a "fundamental requirement of the due process clause is that an individual receive notice and the opportunity for a hearing before he is deprived of a significant property interest." 157 F.3d at 1076. With respect to immunity agreements, due process "requires prosecutors to scrupulously adhere to commitments made to suspects in which they induce the suspects to surrender their constitutional rights in exchange for the suspects giving evidence that the government needs against others which simultaneously implicates themselves." *Id.*, citing *Verrusio*, 803 F.2d 885, 888 (7th Cir. 1986). Importantly, the Seventh Circuit stated that the "preferred procedure" would be for the government to seek relief from its obligations under the immunity agreement *prior* to indictment. *Meyer*, at 1077. Thus, under the Seventh Circuit's

case law (contrary to the decision below), parties seeking to cooperate under the U.S. regime could conclude that they would have a pre-indictment opportunity to contest a government decision to indict, and to preserve the nature of the bargain with prosecutors if the government's position on compliance with the agreement was not well-grounded.

II. THE GOVERNMENT'S REPRESENTATIONS ON IMMUNITY INCREASE CONFUSION REGARDING PROTECTIONS FOR AMNESTY APPLICANTS.

Since the inception of its Leniency Policy, DOJ has continued to represent that it will forego prosecution of parties that enter into an amnesty agreement: "'Leniency' means not charging such a firm criminally for the activity being reported." DOJ Corporate Leniency Policy (Issued Aug. 10, 1993). DOJ has held out the surrender of prosecutorial discretion as its part of the bargain with potential applicants, stating: "However, in order for an Amnesty Program to work, you need to do more than just publicize your policies and educate the public. *You have to be willing to make the ultimate sacrifice for transparency—the abdication of prosecutorial discretion.*" Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond (Sept. 12, 2000) (emphasis added) ("The Division's Amnesty Program by its very nature is transparent because we have eliminated, to a great extent, the exercise of prosecutorial discretion in its application.").[1] Although seemingly contrary to its actions in this case, DOJ maintains that transparency is a key component of any successful amnesty program. Speech

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[1] "An amnesty program must provide significant benefits as compared with the alternative strategies of staying in a cartel or withdrawing but remaining silent. . . . [I]f they take the risk of coming forward, they will get the reward." Speech by Assistant Attorney Gen. Antitrust Division Thomas O. Barnett (Sept. 14, 2006).

by Assistant Attorney Gen. Antitrust Division Thomas O. Barnett (Sept. 14, 2006) ("There must be predictability and transparency to the amnesty program.").[2] DOJ is aware of its influence upon other antitrust amnesty programs.[3]

III. THE DECISION BELOW WEAKENS THE EFFICACY OF AMNESTY PROGRAMS ABROAD AND RISKS CREATING POLITICAL CONFLICT.

The United States has recognized that a leniency program works only if there is predictability and certainty in obtaining amnesty. This sentiment has been echoed by other regimes. The Organisation for Economic Co-operation and Development ("OECD") has recognized that "firms may be more likely to come forward if the conditions and the likely benefits of doing so are clear. To maximize the incentive for defection and encourage cartels to break down more quickly, it is important not only that the first one to confess receive the 'best deal', but also that the terms of the deal be as clear as possible at the outset." OECD, Directorate for Financial Fiscal and Enterprise Affairs, Committee on Competition

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[2] "[T]he success of an amnesty program depends on potential applicants having confidence that they will obtain the benefits of amnesty if they comply with a set of clear requirements. In the United States' experience, cooperating parties come forward in direct proportion to the predictability and certainty of their treatment following cooperation." Speech by Assistant Attorney Gen. Antitrust Division Thomas O. Barnett (Sept. 14, 2006).

[3] "[T]he benefits of vigorous, principled cartel enforcement flow across borders." *Id.* (Comparing the DOJ's policies to spin-off enforcement and amnesty programs in Japan, Ireland, Israel, United Kingdom (noting "creation of a corporate leniency program modeled after the Division's Leniency Program"), Canada, and the European Commission (noting that "cartel investigators in the Division have never worked as closely and as effectively with our colleagues in the European Commission as they do today. A prime example is the convergence in our corporate leniency programs . . .")).

Law and Policy, "Report on Leniency Programmes to Fight Hard Core Cartels," DAFFE/CLP (2001) 13, at 2. The European Union likewise recognizes that amnesty applicants should be entitled to fair notice of their risks when coming forward to cooperate with the government. "[E]xperience has shown that [an amnesty program's] effectiveness would be improved by an increase in the transparency and certainty of the conditions on which any reduction of fines will be granted." Commission notice on immunity from fines and reduction of fines in cartel cases, (2002/C 45/03) (Feb. 19, 2002), at 1 ("Commission Notice"). "The Commission is aware that this notice will create legitimate expectations on which under-takings may rely when disclosing the existence of a cartel to the Commission." Commission Notice, at 2. Without transparency, potential applicants are unlikely to reveal themselves and cartels could go uncovered because, as noted by U.S. enforcers, "[u]ncertainty in the qualification process will kill an amnesty program." Speech by Antitrust Division Director of Criminal Enforcement Scott D. Hammond (Sept. 12, 2000).

The decision below raises legitimate concerns in the bar and with companies, which must now re-evaluate the appeal and utility of the U.S. amnesty program. Sue Reisinger, *Promise Breakers*, CORPORATE COUNSEL, at 21 (Sept. 2006) (positing that the government's attempt to renege on its deal with an amnesty applicant has caused companies to question whether non-prosecution agreements can still deliver their main benefit—freedom from indictment); Richard M. Cooper, *Non-prosecution Issues*, THE NATIONAL LAW JOURNAL, at 15 (Apr. 10, 2006) (noting that an indictment may be economically as harmful—or more so—as an ultimate conviction). The pressure of the amnesty process is not insignificant, and "there is no going back." ABA Section of Antitrust Law, *Spanning the Globe: What Every In-House Counsel at a Multinational Company Needs to Know*, 3 THE ANTITRUST SOURCE 4, at 7 (March 2004) ("*Spanning the Globe*") (noting that "[T]he

decision to seek amnesty is a monumental and extraordinarily difficult one. Once an amnesty request has been made, as a practical matter there is no going back."). Because of the global influence of the U.S. regime, potential amnesty seekers rightfully wonder if other jurisdictions will follow suit—as they play "follow the leader" in setting up their own amnesty regimes. *Spanning the Globe*, at 7 ("All the cartel enforcers around the world are bragging of late about how much cooperation there is, so, clearly, they are talking to one another.").

As noted, many foreign national and regional competition regimes pattern their programs after those of the United States. In particular, the governments of Canada and the United Kingdom openly rely on U.S. policy as part of their leniency programs. In analyzing particular elements of its leniency program, Canada has cited that "[t]he US DOJ's Corporate Leniency Policy is the foundation of the [Canadian] Bureau's approach." Competition Bureau Canada, "Immunity Program Review Consultation Paper—Erratum," Competition Bureau (February 2006), at 19 (examining the role of the applicant in the illegal activity) and 24 (noting that Canada's "immunity plus" program is "based on the U.S. DOJ 'amnesty plus' program . . ."). Canada has similarly stated that "[p]olicy convergence will assist applicants seeking immunity in multiple jurisdictions and facilitate cooperation and coordination among competition authorities. It is particularly relevant in respect of the United States (the 'U.S.'), given geographic proximity and market integration." Erratum, at 3. The approach of Canada is similar to that of the United Kingdom.

The U.K.'s Office of Fair Trading ("OFT") has mechanically incorporated facets of the U.S. amnesty approach into its own program on leniency. For example, on the issue of an amnesty-plus option, OFT has stated: "The UK practice is intended closely to mirror the US practice." Office of Fair

Trading, "Leniency and no-action," OFT's interim note on the handling of applications at 22, OFT803 (July 2005). In addition, OFT has held up the U.S. program as a standard in developing its own analysis of amnesty positions with regard to: coercion ("As with the Department of Justice currently, the OFT believes . . ."), at 11, 12; dishonesty ("Fundamentally, there is no difference here with the US system . . ."), at 13, 15; and amnesty for individual applicants ("As with the US system, an individual is at liberty to apply for individual immunity . . ."), at 17. Reliance on the U.S. approach will undoubtedly lead other regimes to question their own power to unilaterally revoke a non-prosecution agreement. This shift in the transparency and predictability of leniency programs would result in a diminution of incentive or clarity for multinational companies that contemplate cooperating with competition enforcers.

CONCLUSION

For the foregoing reasons, INTERTANKO respectfully requests that the Court grant the petition of Stolt-Nielsen, S.A., *et al.*, for issuance of a writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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